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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ROUSE SI SHOPPING CENTER, INC.,

Petitioner,

v.

Morse/Diesel, Inc., Den-Al Realty Corp., Esposito Concrete Co., Inc., North Eastern Fabricators, Inc., Dominick Natale, d/b/a D. Natale Plumbing & Heating Co., Sette & Juliano Wrecking Corp. East End Wrecking Corp.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Question Presented

Does New York's Lien Law—which permitted respondents to obtain mechanic's and materialman's liens against petitioner's real property aggregating more than $1 million without prior notice, without prior judicial review, without the filing of security, without making any showing of the merits of their claims and without affording petitioner any pretrial hearing as to the substantive validity of respondents' claims—violate the Fourteenth Amendment to the United States Constitution where the effect of the liens is to impinge on petitioner's economic interest in the real property?

List of Parties in the Court of Appeals

The parties to the proceeding in the Court of Appeals for the Second Circuit are those listed in the caption.*

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* The parent companies, subsidiaries and affiliates of Rouse SI Shopping Center, Inc. are:

Almeda Mall, Inc.; AM Management Corporation; American City Corporation, The; AU Management Corporation; Augusta Mall, Inc.; Austin Mall, Inc.; Austin North, Inc.

Baltimore Center, Inc.; Baltimore Inn, Inc.; Beachwood Place, Inc.; Brittany Development Company; Bull Market, Inc.

Charlottetown, Inc.; Charlottetown North, Inc.; Cherry Hill Center, Inc.; C.H.H. Homes, Inc.; Clover Square of New Jersey, Inc.; Clover Square of Pennsylvania, Inc.; Columbia Center For Community Research, Inc., The; Columbia Hotel Leasing Corporation; Community Research and Development, Inc.; Concord Place, Inc.; Covina Homes, Inc.; Cross Keys Administration, Inc.; Cross Keys Management Services, Inc.

Deerfield Homes, Inc.; DK Management Corporation; DK Shopping Center, Inc.; DM Shopping Center, Inc.

Eastfield Mall, Incorporated; Echelon Mall, Inc.; Echelon Urban Center, Inc. (formerly Echelon Community, Inc.); Echo Farms Golf and Country Club, Inc.; Exton Square, Inc.

Faneuil Gallery, Inc.; Faneuil Hall Marketplace, Inc. (formerly Rouse-Boston, Inc.); Faneuil Hall Marketplace Arcade, Inc.; Franklin Park Mall, Inc.; Franklin Park Mall Management Corporation; Franklin Properties, Inc.

Gallery Maintenance, Inc.; Governor's Square, Inc.; Greengate Mall, Inc.; Gwynns Falls Management Corporation; Gwynns Falls Shopping Center, Inc.

Harborplace, Inc.; Harborplace Management Corporation; Harundale Mall, Inc.; Hermes Incorporated.

James W. Rouse Securities Company, Inc. (closed corp.); Jeffers Hill Development Company.

Louisville Shopping Center, Inc.

Marcal Builders, Inc.

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NC Management Corporation; NC Shopping Center, Inc.; New River Center, Inc.; Norbury Construction Company; North Hills Co.; North Star Mall, Inc.; Northway Mall, Inc.; Northwest Mall, Inc.; NS Management Corporation; NW Management Corporation.

Outlet Lending Company, Inc.; Outlet Square of Atlanta, Inc.; Owen Brown B Development Company; Owen Brown Chapman Development Company; Owen Brown D Development Company; Owen Brown E Development Company; Owen Brown Prestbury Development Company; Owen Brown Tacoma Development Company; Owen Brown Tatsfield Development Company.

Painters Mill Mall, Inc.; Paramus Park, Inc. (formerly Paramus Mall, Inc.); Perimeter Center, Inc.; Perimeter Mall, Inc.; Perimeter Mall Management Corporation; Plymouth Meeting Mall, Inc.

Quincy Market Corporation.

Roost, Inc., The; Rouse-Boston Development Company, Inc.; Rouse-Burlington, Inc.; Rouse-Carillon Management Company, Inc.; Rouse-Carillon Shopping Center, Inc.; Rouse Chapel Square, Inc.; Rouse-Chicago, Inc.; Rouse Communications Company, Inc.; Rouse Community Research & Development Company of New York, Inc.; Rouse Company, The (formerly Community Research and Development, Inc.); Rouse Company Foundation, Inc., The (formerly James W. Rouse And Company Foundation, Inc.); Rouse Company of Alabama, Inc., The; Rouse Company of Arkansas, Inc., The; Rouse Company of California, Inc., The; Rouse Company of Colorado, Inc., The; Rouse Company of Connecticut, Inc., The; Rouse Company of Florida, Inc., The; Rouse Company of Georgia, Inc., The; Rouse Company of Illinois, Inc., The; Rouse Company of Kentucky, Inc., The; Rouse Company of Louisiana, The; Rouse Company of Massachusetts, Inc., The; Rouse Company of Missouri, Inc., The; Rouse Company of New Hampshire, Inc., The; Rouse Company of New Jersey, Inc., The; Rouse Company of North Carolina, Inc., The; Rouse Company of Ohio, Inc., The; Rouse Company of Oklahoma, Inc., The; Rouse Company of Oregon, Inc., The; Rouse Company of Pennsylvania, Inc., The; Rouse Company of South Carolina, Inc., The; Rouse Company of St. Louis, Inc., The; Rouse Company of Tennessee, Inc., The; Rouse Company of Texas, Inc., The; Rouse Company of Washington, Inc., The; Rouse Company of Washington, D.C., Inc., The; Rouse Company of Wisconsin, Inc., The; Rouse Connecticut Post Management Corporation; Rouse

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Connecticut Post Shopping Center, Inc.; Rouse Credit Corporation; Rouse Development Company of California, Inc., The; Rouse DM Management Corporation; Rouse Fort Worth, Inc.; Rouse-Glen Burnie, Inc.; Rouse Holding Company, The; Rouse Insurance, Inc.; Rouse Insurance Agency of Va., Inc.; Rouse Investing Company; Rouse Management Services Corporation; Rouse Management Services Corporation of Arkansas, Inc.; Rouse Management Services Corporation of Colorado, Inc.; Rouse Management Services Corporation of Iowa, Inc.; Rouse Management Services Corporation Two of Iowa, Inc.; Rouse Management Services Corporation of Louisiana, Inc.; Rouse Management Services Corporation of Texas, Inc.; Rouse-Metro Shopping Center, Inc.; Rouse-Milwaukee, Inc.; Rouse-Milwaukee Concourse Management, Inc.; Rouse-Milwaukee Garage Maintenance, Inc.; Rouse Missouri Holding Company; Rouse Missouri Management Corporation; Rouse-Monmouth, Inc.; Rouse New Haven Parking Management, Inc.; Rouse New Haven Shopping Center, Inc.; Rouse-New Orleans, Inc.; Rouse-Oakwood Shopping Center, Inc.; Rouse Office Buildings, Inc.; Rouse Philadelphia, Inc.; Rouse Philadelphia Two, Inc.; Rouse Philadelphia III, Inc.; Rouse-Plymouth, Inc.; Rouse-Portland, Inc.; Rouse-Portsmouth, Inc.; Rouse-Randhurst Shopping Center, Inc.; Rouse Real Estate Finance, Inc. (formerly James W. Rouse & Company, Incorporated); Rouse Risk Management Incorporated (Sub of Rouse Insurance, Inc.); Rouse Service (Canada) Limited; Rouse Service Company, The; Rouse SI Shopping Management, Inc.; Rouse South Austin, Inc.; Rouse South Beach, Inc.; Rouse-Tabor Center, Inc.; Rouse-Tampa, Inc.; Rouse-Wates, Incorporated.

Salem Mall, Incorporated; Saratoga Equipment Corporation, The; SCASCO, Inc.; Seaport Marketplace, Inc.; Seaport Marketplace Theatre, Inc.; Seaport Theatre Management Corporation; Sherway Mall Hotel Limited; SMPL Management, Inc.

Terrell Mill Homes, Inc.; Two Faneuil Hall Marketplace, Inc.; 306 Corporation.

Village of Cross Keys, Incorporated, The; Village of Cross Keys Recreation Association, Inc., The; White Marsh Equities Corporation (formerly The Foster Development Corporation); White Marsh Mall, Inc.; Willowbrook Corporation, The; Willowbrook Management Corporation; Wilmington Homes, Inc.; Woodbridge Center, Inc.

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Petition for a Writ of Certiorari

Petitioner Rouse SI Shopping Center, Inc. ("Rouse SI"), respectfully asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, which affirmed a judgment of the United States District Court for the Southern District of New York dismissing this action.

Opinions Below

The order of the Court of Appeals for the Second Circuit, dated June 6, 1983, is not reported. It is reproduced in the appendix at A1.

Memorandum opinions of the United States District Court for the Southern District of New York appear at A4 and A16. An amendment to the second of these decisions appears at A20. The judgment and order of the District Court appear at A22.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment sought to be reviewed was entered on June 6, 1983.

Because this petition draws into question the constitutionality of a state statute and neither the State nor any agency, officer or employee thereof is a party, 28 U.S.C. § 2403(b) may be applicable. The courts below did not certify to the State Attorney General that the constitutionality of such State statute was drawn in question.

Constitutional Provisions and Statutes

This case involves the Fourteenth Amendment to the United States Constitution and the New York Lien Law §§ 1 *et seq.* (McKinney 1966 & Supp. 1982), which are set out, in relevant part, in the appendix.

notice needed to be given to Rouse SI before the liens were filed, and no such notice was given.* Lien Law § 11.

The notice of lien need contain only conclusory, *pro forma* allegations such as the alleged value of the labor allegedly performed and the materials allegedly furnished.** Lien Law § 9. The notice of lien need *not* state, among other things: (1) that the work was performed properly or in timely fashion; (2) that the lienor has reason to doubt the property owner's willingness or ability to pay the amount allegedly due; (3) that the lienor is likely to succeed on the merits; (4) that the amount claimed by the lienor exceeds all known counterclaims; or (5) that the lienor is unaware of any defenses to his claim. While the notice of lien must be verified, it may contain statements made on information and belief.

Thus, the Lien Law allows a contractor to obtain a lien against real property without prior notice to the owner, without a hearing, without filing a complaint, without posting a bond, and without prior judicial review. Indeed, the Lien Law permits such a lien to be obtained even when the lienor knows that the owner of the property has a complete defense against his claim.

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* Indeed, the lienor need not ever provide notice to the owner of the property. The Lien Law provides that "[u]ntil service of the notice has been made . . . an owner, without knowledge of the lien shall be protected on any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien." Lien Law § 11.

** The notice of lien need specify only the name and address of the lienor and its attorney, the name and interest of the owner of the real property, the name of the person who employed the lienor, the labor allegedly performed and materials allegedly furnished, the alleged price or value of the labor and materials, the amount unpaid, the time when the first and last items of work were performed and materials furnished, and a description of the real property against which the lien is claimed. Lien Law § 9.

Once filed, it is virtually impossible for an owner to obtain discharge of a lien prior to final judgment in a lien foreclosure action—no matter how strong the owner's defense may be. While the lien terminates if the lienor fails to commence an action to foreclose on the lien within one year, the lienor may seek an unlimited number of one-year extensions to file the foreclosure action. Lien Law § 17. The owner may demand that the lienor commence the foreclosure action within 30 days. Lien Law § 59. But the foreclosure action does not provide an interim test of the validity of the lien; it simply permits the owner to insist that the case proceed to trial and judgment in the normal manner which, realistically, may take many months or even years. The lien remains in place throughout the foreclosure proceeding. Unless the owner provides a bond or undertaking in an amount at least equal to the amount claimed in the notice of lien. Lien Law § 19(4).

The owner may seek summary discharge of the lien only if the notice is *facially* invalid.* Summary discharge, however, is an extremely limited remedy confined to very few errors. Lien Law § 19(6). And in many cases a facially invalid notice can be amended. Lien Law § 12-a. Thus, the statute offers no relief whatsoever against a facially adequate, timely filed notice, apart from a trial on the merits or posting a bond to discharge the lien.

Proceedings Below

This action was commenced on March 15, 1982. The third cause of action sought a declaration that the New York

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* Lien Law § 59 permits the owner to move for an order vacating the lien. Such a motion may be granted, however, only if the notice of lien is invalid on its face. *See, e.g., Dember Construction Corp.* v. *P & R Electric Corp.*, 76 A.D.2d 540, 544, 431 N.Y.S.2d 586, 589 (2d Dep't 1980).

Lien Law violated the Fourteenth Amendment and that respondents' liens therefore were invalid.*

The District Court dismissed the third cause of action for failure to state a claim upon which relief could be granted (A15) and, after further proceedings, entered judgment dismissing the action (A22). It rejected the constitutional claim on the ground that "the Supreme Court's summary dismissal of *Carl A. Morse, Inc.* [439 U.S. 804 (1978),] requires us to dismiss the third claim . . ." (A9)

The Second Circuit affirmed, stating that *Carl A. Morse* "holds that the challenged portion of the New York Lien Law is constitutional." (A2)

The *Carl A. Morse* Case

In *Rentar Industrial Development Corp.* v. *Carl A. Morse, Inc.*, 439 U.S. 804 (1978) (referred to hereinafter as *Carl A. Morse, Inc.*), this Court dismissed for want of a substantial federal question an appeal from an order of the New York Court of Appeals which had affirmed the denial of a motion for partial summary judgment invalidating a mechanic's lien on the alternative grounds that the nature of the lienor's services did not give rise to a lien under the New York Lien Law and that the Lien Law was unconstitutional.

The courts below took this Court's action as conclusively determining the validity of the Lien Law.

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* The other causes of action did not assert federal claims and are not material to this petition.

Reasons for Granting the Writ

I

There Is a Sharp Conflict as to the Constitutionality of Nonpossessory Prejudgment Remedies.

There is a substantial conflict among state and federal courts as to the constitutionality of mechanic's lien and other statutes which afford creditors nonpossessory prejudgment liens or attachments without the due process safeguards that this Court has held essential with respect to possessory remedies.*

1. The Second Circuit, in upholding the constitutionality of the New York Lien Law, became the first federal court of appeals to rule on the constitutionality of mechanic's lien statutes.** It joined a large number of federal and state courts which have ruled on the issue. These courts, however, have not spoken with one voice. Indeed, the wealth of such cases eloquently testifies to a confusion which this Court should resolve.

On the one hand, numerous courts, in conflict with the Second Circuit, have struck down comparable statutes in other states on the ground that such statutes violated the Due Process Clause. In each case, the court necessarily ruled that the statute (1) effected a taking or impairment of property sufficient to implicate the Due Process Clause,

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* *See, e.g., North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969).

** The Ninth Circuit had previously upheld a Washington statute which regulated prejudgment attachment of real estate. *Hansen* v. *Weyerhaeuser Co. (In re Northwest Homes of Chehalis Inc.)*, 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976).

and (2) provided insufficient procedural safeguards to satisfy its requirements.*

On the other hand, courts have upheld such statutes in several states, albeit without developing a consistent rationale. The California Supreme Court, for example, has held that its mechanic's lien statute involves a taking of property sufficient to require due process safeguards, but that the statute's procedural requirements are adequate.** Other courts, however, have held that mechanic's liens and comparable prejudgment remedies involve no more than a *de minimis* taking of property, undeserving of due process

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* *MPI, Inc.* v. *McCullough*, 463 F. Supp. 887 (N.D. Miss. 1978) (Mississippi real estate attachment procedure); *United States General, Inc.* v. *Arndt*, 417 F. Supp. 1300 (E.D. Wis. 1976) (3-judge court) (Wisconsin real estate attachment statute); *Terranova* v. *Avco Financial Services of Barre, Inc.*, 396 F. Supp. 1402 (D. Vt. 1975) (3-judge court) (Vermont real estate attachment statute); *Bay State Harness Horse Racing and Breeding Association* v. *PPG Industries*, 365 F. Supp. 1299 (D. Mass. 1973) (3-judge court) (Massachusetts mechanic's lien statute); *Clement* v. *4 North State Street Corp.*, 360 F. Supp. 933 (D.N.H. 1973) (3-judge court) (New Hampshire real estate attachment statute); *Gunter* v. *Merchants Warren National Bank*, 360 F. Supp. 1085 (D. Me. 1973) (3-judge Court) (Maine real estate attachment law); *Owens-Corning Fiberglass Corp.* v. *Lewis*, 169 Conn. 76, 362 A.2d 968 (1975) (Connecticut mechanic's lien statute); *Roundhouse Construction Corp.* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 362 A.2d 778, *judgment vacated*, 423 U.S. 809 (1975), *on remand*, 170 Conn. 155, 365 A.2d 393, *cert. denied*, 429 U.S. 889 (1976) (Connecticut mechanic's lien statute); *Barry Properties, Inc.* v. *Fick Brothers Roofing Co.*, 353 A.2d 222 (Md. 1975) (Maryland mechanic's lien statute). *Cf. Briere* v. *Agway, Inc.*, 425 F. Supp. 654 (D. Vt. 1977) (3-judge court) (Vermont rule providing for nonpossessory prejudgment attachment of personal property held to violate Due Process Clause).

** *Connolly Development Inc.* v. *Superior Court*, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976) (In Bank), *appeal dis-*

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protection.* Even these cases do not exhaust all the possibilities: there are some cases in which no clear, explicit

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missed, 429 U.S. 1056 (1977). *See also Hutchison* v. *Bank of North Carolina, N.A.*, 392 F. Supp. 888 (M.D.N.C. 1975) (3-judge court); *Ruocco* v. *Brinker*, 380 F. Supp. 432 (S.D. Fla. 1974) (3-judge court) (Florida mechanic's lien statute); *Keith Young and Sons Construction Co.* v. *Victor Senior Citizens Housing Inc.*, 262 N.W.2d 554 (Iowa 1978) (Iowa mechanic's lien statute); *Bustell* v. *Bustell*, 170 Mont. 457, 555 P.2d 722 (1976), *appeal dismissed*, 430 U.S. 925 (1977) (Montana real estate attachment statute).

* *Hansen* v. *Weyerhaeuser Co.* (*In re Northwest Homes of Chehalis, Inc.*), 526 F.2d 505 (9th Cir. 1975), *cert. denied*, 425 U.S. 907 (1976) (Washington real estate attachment statute); *B&P Development* v. *Walker*, 420 F. Supp. 704 (W.D. Pa. 1976) (Pennsylvania mechanic's lien statute); *National Permanent Federal Savings & Loan Association* v. *Virginia Concrete Co.* (*In re Thomas A. Cary, Inc.*), 412 F. Supp. 667 (E.D. Va. 1976), *aff'd mem.*, 562 F.2d 47, 562 F.2d 48 (4th Cir. 1977) (Virginia mechanic's lien statute); *Spielman-Fond, Inc.* v. *Hanson's, Inc.*, 379 F. Supp. 997 (D. Ariz. 1973), *aff'd mem.*, 417 U.S. 901 (1974) (Arizona mechanic's lien statute); *Cook* v. *Carlson*, 364 F. Supp. 24 (D.S.D. 1973) (South Dakota mechanic's lien statute); *Nelson-American Developers, Ltd.* v. *Enco Engineering Corp.*, 337 So. 2d 729 (Ala. 1976) (Alabama mechanic's lien statute); *First Recreation Corp.* v. *Amoroso*, 113 Ariz. 572, 558 P.2d 917 (1976) (en banc) (Arizona real estate attachment statute); *Bankers Trust Co.* v. *El Paso Pre-Cast Co.*, 192 Colo. 468, 560 P.2d 457 (1977) (en banc) (Colorado mechanic's lien statute); *Tucker Door & Trim Corp.* v. *15th Street Co.*, 235 Ga. 727, 221 S.E.2d 433 (1975) (Georgia materialman's lien statute); *Home Building Corp.* v. *Ventura Corp.*, 568 S.W.2d 769 (Mo. 1978) (en banc) (Missouri mechanic's lien statute); *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, 56 A.D.2d 30, 391 N.Y.S.2d 425 (2d Dep't 1977), *aff'd mem.*, 43 N.Y.2d 952, 375 N.E.2d 409, 404 N.Y.S.2d 343, *appeal dismissed*, 439 U.S. 804 (1978) (New York Lien Law); *Mobile Components, Inc.* v. *Layon*, 623 P.2d 591 (Okla. 1980), *cert. denied*, 454 U.S. 963 (1981) (Oklahoma materialman's lien statute); *Silverman* v. *Gossett*, 553 S.W.2d 581 (Tenn. 1977) (Tennessee mechanic's lien statute).

ground emerges for the court's upholding a state lien law against an attack on due process grounds.*

This bewildering profusion of cases vividly demonstrates that this issue cries out for review by this Court.

2. Certiorari should be granted here despite the fact that the constitutionality of mechanic's lien statutes was before this Court in two cases that were disposed of summarily. *Carl A. Morse, Inc., supra,* 439 U.S. 804 and *Spielman-Fond, Inc.* v. *Hanson's, Inc.,* 417 U.S. 901 (1974) (summarily affirming decision upholding Arizona mechanic's lien statute).

Those decisions have not resolved the conflicts as to the constitutionality of non-possessory prejudgment remedies. Lower courts remain sharply divided.

This confusion doubtless stems from the summary disposition of those cases by this Court and subsequent doctrinal developments. *Carl A. Morse, Inc., supra,* 439 U.S. 804, dismissed for want of a substantial federal question an order affirming denial of a motion for partial summary judgment where the courts below found that there were issues of fact as to whether the lienor rendered services of a type for which the challenged statute afforded a lien. Hence, this Court's action may be construed as a refusal to

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* *Spielman-Fond, Inc.* v. *Hanson's, Inc.,* 417 U.S. 901 (1974), *aff'g mem.,* 379 F. Supp. 997 (D. Ariz. 1973) (3-judge court) (Arizona mechanic's lien statute); *Brook Hollow Associates* v. *J. E. Greene, Inc.,* 389 F. Supp. 1322 (D. Conn. 1975), *vacated without opinion,* 535 F.2d 1240 (2d Cir. 1975) (Connecticut mechanic's lien statute); *South Central District of the Pentecostal Church of God of America, Inc.* v. *Bruce-Rogers Co.,* 269 Ark. 130, 599 S.W.2d 702 (1980) (Arkansas mechanic's lien statute); *accord, Williams & Works, Inc.* v. *Springfield Corp.,* 81 Mich. App. 355, 265 N.W.2d 328 (1978), *rev'd on other grounds,* 408 Mich. 732, 293 N.W.2d 304 (1980) (Michigan mechanic's lien statute).

decide the constitutionality of the New York Lien Law because the question was not inescapably presented until the issue regarding the nature of the lienor's services was resolved. And while *Spielman-Fond* did affirm a ruling upholding the Arizona mechanic's lien statute, it antedated *North Georgia Finishing, supra*, 419 U.S. 601, and therefore is of questionable authority.* Indeed, neither of the courts below relied on it in this case.

In sum, this Court should grant plenary review to resolve the conflicts that persist despite the summary dispositions in *Carl A. Morse, Inc.* and *Spielman-Fond.*

II

The Decision Below Disregarded This Court's Teachings in *Sniadach, Fuentes, Mitchell* and *North Georgia.*

In four landmark cases—*Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969), *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974) and *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975)—this Court articulated the constitutional standards that must be satisfied by state-authorized prejudgment impairments of property interests. Such laws must provide either prior notice and an opportunity to be heard or a combination of alternative procedural protections designed to guard against the risk of initial error such as: (1) an affidavit setting forth in detail the specific facts justifying prejudgment relief; (2) judicial review before prejudgment relief is granted; (3) the posting of a bond by

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* Subsequent doctrinal developments deprive a summary disposition of binding effect. *E.g., Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975); R. Stern & E. Gressman, *Supreme Court Practice* § 4.31, at 331 (5th ed. 1978).

the party seeking relief; and (4) an opportunity to seek immediate dissolution of the prejudgment remedy.

As we show below, the New York Lien Law significantly impairs property interests without providing adequate safeguards. This Court should grant certiorari because the decision below thus conflicts with applicable decisions of this Court.

A. The Lien Law Does Not Afford Due Process of Law.

The procedures in the New York Lien Law are not adequate to safeguard the owner's interests. Not only does the Lien Law fail to provide for prior notice to the owner and an opportunity to be heard, but it also fails to provide any of the other safeguards which this Court has held may save a statute in the absence of prior notice and a hearing. In upholding the New York Lien Law, the courts below therefore deviated from this Court's teaching on what process is due.

Thus, in *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), the Supreme Court invalidated Florida and Pennsylvania laws authorizing summary seizure of personal property under a writ of replevin. Both statutes permitted summary seizure on the *ex parte* application of a claimant who posted a security bond. Neither provided for prior notice to the possessor and an opportunity to be heard. The Florida statute allowed a court clerk to issue the writ to a party on the bare assertion that he was entitled to one, provided he file a complaint initiating a court action for repossession. The Pennsylvania statute did not even oblige the party seeking the writ to initiate a court action for possession. Both statutes permitted the party whose property had been seized to regain it by posting a bond for double the value of the property seized within three days. *Id.* at 73-78.

Even though plaintiffs in *Fuentes* did not have full title to the chattels seized, the Court concluded that these statutes deprived plaintiffs of interests protected by the Fourteenth Amendment. The Court held that, in these circumstances, due process required prior notice and an opportunity to be heard. It flatly rejected the minimal procedural safeguards provided by the Florida and Pennsylvania statutes:

> To be sure, the requirements that a party seeking a writ must first post a bond, allege conclusorily that he is entitled to specific goods, and open himself to possible liability in damages if he is wrong, serve to deter wholly unfounded applications for writ. But those requirements are hardly a substitute for a prior hearing, for they test no more than the strength of the applicant's own belief in his rights. Since his private gain is at stake, the danger is all too great that his confidence in his cause will be misplaced . . . [A] court does not decide a dispute until it has had an opportunity to hear both sides—and does not generally take even tentative action until it has itself examined the support for the plaintiff's position. The Florida and Pennsylvania statutes do not even require the official issuing a writ of replevin to do that much.

Id. at 83.

By contrast, in *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), the Court sustained a Louisiana statute under which a vendor who had sold personal property on the installment plan and had retained a vendor's lien was authorized to seek sequestration of the property. The Louisiana statute provided significant safeguards missing both in *Fuentes* and from the New York Lien Law: *First*, a writ of sequestration could not issue on "conclusory allegations of ownership or possessory rights," but only on a "clear

showing" of "specific facts" in a verified petition or affidavit. *Second*, this clear showing had to be made to a judge. *Third*, the judge could issue the writ only after the creditor had filed a bond to protect the debtor against all damages in the event that sequestration was later shown to have been improvident. *Fourth*, and most importantly, the statute permitted the debtor to obtain an immediate hearing on the question of dissolution.* *Id.* at 605-06.

The importance of the *Mitchell* safeguards was underscored in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975), in which the Court invalidated the Georgia garnishment statute. That statute authorized the clerk of any court of record to issue a garnishment order on the plaintiff's affidavit that he had reason to apprehend the loss of some or all of the amount claimed unless garnishment occurred. The statute required the garnishor to file a bond for twice the amount sought. The garnishment could be dissolved upon filing a bond for the payment of any judgment that might be rendered on the garnishment. *Id.* at 602-03.

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* *Mitchell* also relied on the special needs of sellers of consumer goods on credit, considerations which do not apply in the context of real property. The Court emphasized that while Mitchell technically had title to the goods, his title was heavily encumbered by the lien which the vendor had retained when the goods were sold. Sequestration thus preserved the value of the vendor's security since consumers customarily use the goods they purchase, thereby diminishing the value of the merchandise. Moreover, Louisiana's law provided that the vendor's lien expired upon a transfer of possession. As a result, if notice and a pre-seizure hearing were required, the debtor would be able to conceal, destroy, or transfer the personal property, thus vitiating the vendor's lien interest. 416 U.S. 608-09.

None of these justifications for summary relief is present in the context of this case: Rouse SI has title to the Mall, the Mall is likely to appreciate in value rather than decrease, and, unlike personal property, real property cannot be destroyed or concealed.

In holding the Georgia statute inconsistent with due process, the Court focused on "the saving characteristics of the Louisiana statute" that had been upheld in *Mitchell*. *Id.* at 607. The Louisiana writ of sequestration was issuable only on the filing of a detailed affidavit containing more than conclusory allegations and only after review by a neutral judicial officer. Moreover, Louisiana provided for an immediate hearing after seizure.

Like the New York Lien Law, the Georgia statute lacked those "saving characteristics." The writ of garnishment was issuable by a court clerk, without participation by a judge, on an affidavit containing only conclusory allegations. The most serious deficiency of the Georgia procedure, however, was its failure to provide a prompt and adequate postgarnishment hearing at which the garnishor would be required to demonstrate at least probable cause:

> Here a sizable bank account was frozen, and the only method discernable on the face of the statute to dissolve the garnishment was to file a bond to protect the plaintiff creditor. There is no provision for an early hearing at which the creditor would be required to demonstrate at least probable cause for the garnishment.

Id. at 607. *See also id.* at 613 (Powell, J., concurring) ("The most compelling deficiency in the Georgia procedure is its failure to provide a prompt and adequate postgarnishment hearing").

The New York Lien Law does not meet these standards. Like the statutes invalidated in *Fuentes* and *North Georgia Finishing*, and unlike the Louisiana statute upheld in *Mitchell*, a notice of lien may be filed with the clerk on nothing more than conclusory allegations. Indeed, the New York Lien Law provides even less protection for the owner

than did the Florida, Pennsylvania and Georgia statutes because it does not require the lienor to post a bond to secure the owner against damages. Even more importantly, the Lien Law does not grant the owner an immediate hearing on the question of dissolution. In short, unlike the statute sustained in *Mitchell*, the New York Lien Law does not provide for "judicial control of the process from beginning to end." *Mitchell, supra*, 416 U.S. at 616.*

B. The Lien Law Permits a Significant Impairment of Property Interests.

Many of the cases which have upheld mechanic's lien and comparable statutes against due process attack have distinguished the *Sniadach* line of cases on the ground that they involved interference with the debtor's right to possession, whereas mechanic's lien and real estate attachments are non-possessory. Some have held that the owner's interest in such cases is not sufficient to warrant constitutional protection. This, we submit, is inconsistent with this Court's decision and does not provide a sound basis for distinguishing *Sniadach* and its progeny.

This Court has made clear that "[a]ny significant taking of property by the State is within the purview of the Due

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* To be sure, this Court has noted that "extraordinary situations" may on occasion justify postponing notice and an opportunity to be heard. However, such situations must be "truly unusual" and serve some "important governmental or general public interest." *Fuentes, supra*, 407 U.S. at 90, 92. "[W]hen no more than private gain is directly at stake," summary seizure of property requires at least "a showing of immediate danger that a debtor will destroy or conceal disputed goods." *Id.* at 92-93. For this reason, this Court has refused to find extraordinary circumstances where, as here, *in personam* jurisdiction is readily obtainable. *Sniadach, supra*, 395 U.S. at 339. Furthermore, the New York Lien Law is not narrowly tailored to apply only to "situation[s] requiring special protection to a state or creditor interest." *Id.* at 339. It is therefore invalid.

in *Terranova* v. *Avco Financial Services of Barre, Inc.*, 396 F. Supp. 1402 (D. Vt. 1975), a three-judge district court invalidated Vermont's real estate attachment law. Noting that a real estate attachment may adversely affect the landowner's credit rating and make it difficult or impossible to sell or mortgage the property, the court held that a real estate attachment constitutes a "curtailment of economically important property uses" which cannot be ignored. *Id.* at 1407.

The Maryland Court of Appeals reached the same conclusion in *Barry Properties, Inc.* v. *Fick Bros Roofing Co.*, 277 Md. 15, 23-24, 353 A.2d 222, 228 (1975), stating:

> Although possession will not be wrested from the owner until a purchaser acquires title through a foreclosure sale and the owner can still legally alienate or further encumber the property until that time, in reality, since he no longer has unfettered title, not only will it be extremely difficult for him to do so but additionally his equity will be diminished to the extent of the lien.

The court concluded that an owner is deprived of a "significant property interest" and therefore invalidated portions of Maryland's mechanic's lien law. *Id.* at 31, 353 A.2d at 232.*

Thus, the non-possessory nature of a mechanic's lien does not place the real property owner beyond the pale of consti-

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* *Accord, Clement* v. *Four North State Street Corp., supra,* 360 F. Supp. at 935; *Roundhouse Construction Corp.* v. *Telesco Masons Supplies Co., supra,* 168 Conn. at 384, 362 A.2d at 784; *Gunter* v. *Merchants Warren National Bank, supra,* 360 F. Supp. at 1090; *Bay State Harness Horse Racing and Breeding Association, Inc.* v. *PPG Industries, Inc.*, 365 F. Supp. at 1304-05. *See also, Connolly Development Inc.* v. *Superior Court, supra,* 17 Cal. 3rd at 813-14, 553 P.2d at 644, 132 Cal. Rptr. at 484.

tutional protection. Indeed, the property interest of the lienee arguably exceeds that of the plaintiffs in *Fuentes* because the lienee owns the real estate subject to the lien while the *Feuntes* plaintiffs had only a limited right to possession under conditional sales contracts which reserved title to the sellers until the debts were paid. As Mr. Justice White said in *North Georgia Finishing, supra,* 419 U.S. at 608, due process applies not only to "[c]onsumers or victims of contracts of adhesion and who might be irreparably damaged by temporary deprivation of household necessities" but extends to "the commercial setting . . . involving parties of equal bargaining power." Hence, a mechanic's lien impairs substantial property interests and may be imposed only in accordance with due process of law.

CONCLUSION

We ask this Court to grant *certiorari* to review the Court of Appeals' deviation from the path set out by this Court's decisions in *Sniadach, Fuentes, Mitchell* and *North Georgia* and to resolve the conflict among the lower courts regarding the constitutionality of mechanic's lien statutes. We further request that, upon such grant, the Court reverse the judgment of the Second Circuit and remand this case for further proceeding consistent with its disposition.

Dated: August 29, 1983

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 83-7047

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 6th day of June, one thousand nine hundred and eighty three.

Present:

HONORABLE JAMES L. OAKES, *Circuit Judge*
HONORABLE RICHARD J. CARDAMONE, *Circuit Judge*
HONORABLE LAWRENCE W. PIERCE, *Circuit Judge*

ROUSE SI SHOPPING CENTER, INC.
Plaintiff-Appellant,

—against—

MORSE DIESEL, INC., *et al.*
Defendants-Appellees.

NORTH EASTERN FABRICATORS, INC.
Plaintiff-Appellee,

—against—

ROUSE SI SHOPPING CENTER, INC.
Defendant-Appellant,

and

MORSE DIESEL, INC., *et al.*
Defendants-Appellees.

ORDER

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appendix A

Rouse SI Shopping Center, Inc. (Rouse SI) appeals from an order of the United States District Court for the Southern District of New York (Stewart, J.) dismissing Rouse SI's complaint in *Rouse SI Shopping Center, Inc.* v. *Morse Diesel, Inc.* (Rouse II) for lack of diversity jurisdiction and failure to state a claim upon which relief could be granted. Rouse SI also appeals from the district court's decision to remand to state court another action, *North Eastern Fabricators, Inc.* v. *Rouse SI Shopping Center, Inc.* (*Rouse III*), that had previously been removed to federal court.

1. The district court correctly dismissed for failure to state a cause of action upon which relief could be granted appellant's third claim in *Rouse II*, which challenged the constitutionality of New York's Lien Law. *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, 439 U.S. 804 (1978) holds that the challenged portion of the New York Lien Law is constitutional.

2. The district court properly held that it lacked diversity jurisdiction over appellant's remaining claims in *Rouse II* because both appellant and the defendants were citizens of the same state, New York. Appellant's assertion—that the district court erred in finding its principal place of business to be New York rather than Maryland—is unpersuasive. Rouse SI's main public contacts are in New York, and the "nerve center" analysis is inapplicable here, *see R.G. Barry Corp.* v. *Mushroom Makers, Inc.*, 612 F.2d 651, 655 (2d Cir. 1979).

3. Given the lack of diversity or federal question jurisdiction, the district court properly dismissed appellant's state law claims in *Rouse II*.

4. The district court's decision under 28 U.S.C. § 1447 (c)—remaining *Rouse III* to the New York State Supreme Court—is unreviewable. *See Thermtron Products, Inc.* v.

Hermansdorfer, 423 U.S. 336, 346 (1976); 28 U.S.C. § 1447(d) (1976).

Accordingly, the order of the district court dismissing *Rouse II* is affirmed and appellant's appeal from the remand of *Rouse III* is dismissed.

/s/ JAMES L. OAKES
James L. Oakes, U.S.C.J.

/s/ RICHARD J. CARDAMONE
Richard J. Cardamone, U.S.C.J.

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce, U.S.C.J.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1256 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC.,

Defendant.

82 Civ. 1611 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC., *et al.*,

Defendants.

MEMORANDUM DECISION

STEWART, District Judge:

These actions arise out of the renovation of the Staten Island Mall ("the Mall") in Richmond County, New York. Plaintiff Rouse SI Shopping Center, Inc. ("Rouse") owns and operates the Mall. In May 1981, Rouse hired defendant Morse/Diesel, Inc. ("Morse") as its agent to manage the construction project. Morse in turn hired various contractors and suppliers of material. In March 1982, Rouse brought suit against Morse for breach of

fiduciary duty, breach of contract and negligence in connection with Morse's performance in managing the renovation ("Rouse I"). After Morse and five subcontractors filed mechanics' liens against the Mall, Rouse filed a second action ("Rouse II") seeking a declaration that the New York Lien Law violated the due process clause of the Fourteenth Amendment of the United States Constitution, and other injunctive relief.

Defendant Morse moves to dismiss Rouse I for lack of jurisdiction on the grounds that both parties are citizens of the State of New York. Defendants Morse, Den-Al Realty Corp. ("Den-Al") and North Eastern Fabricators, Inc. ("North Eastern") move to dismiss Rouse II for lack of subject matter jurisdiction, or in the alternative, to dismiss the first and third[1] causes of action for failure to state a claim upon which relief can be granted. We first consider the motions addressed to Rouse II.

1. *Rouse II: Federal Question Jurisdiction*

28 U.S.C. § 1331(a) (Supp. IV 1980) gives the federal district court original jurisdiction of civil actions that "arise[] under the Constitution, laws or treaties of the United States." To "arise under" the federal laws, however, a case must present a "substantial" question. *Hagans* v. *Lavine*, 415 U.S. 528, 536-37 (1974). Thus, a federal court must dismiss a case for lack of jurisdiction if the federal claim that is the basis of jurisdiction is obviously without merit or wholly frivolous. *See* 13 Wright, Miller &

[1] Defendants' motion states that they seek dismissal of the first and third causes of action for failure to state a claim. However, they provide legal arguments only as to the legal sufficiency of the third cause of action (captioned "Violation of Civil Rights Act"). We thus consider the legal sufficiency of the third cause of action only.

Cooper, Federal Practice and Procedure: Jurisdiction § 3564 at 427 (1975).

In this case, we find that plaintiffs have stated a sufficiently substantial federal question in their challenge to the New York Lien Law. Although the United States Supreme Court's summary dismissal of *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, 439 U.S. 804 (1978), *dismissing for want of a substantial federal question appeal from* 43 N.Y.2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978) (finding New York Lien Law valid under due process clause of the Fourteenth Amendment) strongly suggests that plaintiff cannot prevail on the merits, that conclusion is not entirely foregone. Rather, questions such as the precise issues presented and necessarily decided by the summary action must be considered. *See Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). These questions, in themselves, may "present issues of real substance." *Hicks* v. *Miranda*, 422 U.S. 332, 345 n.14 (1975). Thus, plaintiff's claim of unconstitutionality is not so unsubstantial as to warrant dismissal for lack of jurisdiction. The merits of this claim, however, are properly addressed in the context of defendants' motion to dismiss for failure to state a claim.

2. *Motion to Dismiss Third Claim of Rouse II for Failure to State a Claim*

The third cause of action in Rouse II alleges that defendants' filing of notices of lien against the Mall violated the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983 by depriving plainiff of its property without due process of law. Defendants move to dismiss this claim on the grounds that the New York Lien Law is valid under the Due Process Clause of the Fourteenth Amendment, and that defendants were not

acting "under color of state law" when they filed their lien notices.

Our consideration of this matter begins with an examination of the Supreme Court's summary dismissal of *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, 439 U.S. 804 (1978), *dismissing for want of a substantial federal question appeal of* 43 N.Y.2d 952, 404 N.Y.S.2d 343 375 N.E.2d 409. Dismissals for want of substantial federal question by the Supreme Court are dispositions on the merits, and lower courts are bound by them. *Hicks* v. *Miranda*, 422 U.S. 332, 334-335 (1975). But since "the precedential effect of a summary [action] can extend no farther than 'the precise issues presented and necessarily decided by those actions,' " *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-183 (1979), the decision appealed from and the jurisdictional statement submitted by the appellant must be scrutinized to determine what issues were properly presented to the Court and declared to be without merit. *See Bennett* v. *Kline*, 486 F. Supp. 36, 38 (E.D. Pa.), *aff'd*, 633 F.2d 209 (3rd Cir. 1980).

Appellants in *Carl A. Morse, Inc.* appealed an order of the New York Court of Appeals that affirmed a decision of the Appellate Division upholding the New York Lien Law against constitutional challenge. *See Carl A. Morse, Inc.* v. *Rentar Industries Development Corp.*, 43 N.Y.2d 952, 404 N.Y.S.2d 343, 375 N.E.2d 409 (1978) *aff'g* 56 A.D.2d 30, 391 N.Y.S.2d 425 (1977). The Appellate Division, with two justices dissenting, had upheld the statute on the grounds that the filing of a mechanics' lien did "not result in the deprivation of any 'significant property interest' " and hence, due process did not require prior notice or an opportunity to be heard. 56 A.D.2d at 36, 391 N.Y.S.2d at 430. The Appellate Division further noted

the various competing interests involved in the mechanics' lien situation and concluded that "the procedural safeguards incorporated with our present statute (Lien Law § 3, *et seq.*) '[effect] a constitutional accommodation of the conflicting interests of the several parties.' " *Id.* (quoting *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 607 (1974)). The Court of Appeals affirmed on the opinion below, adding that the dissenting opinion "confuse[d] the impact of a lien on property which does not dispossess the owner with the line of cases in the Supreme Court of the United States involving precisely such dispossession by seizure without preliminary judicial determination." 43 N.Y.2d at 952, 404 N.Y.S.2d at 343, 375 N.E.2d at 409.

The Jurisdictional Statement filed by defendants-appellants Rentar Industrial Development Corp. et al. ("Rentar") in their appeal to the United States Supreme Court stated that their appeal presented the questions of whether the filing of a mechanics' lien was a deprivation of property under the Fourteenth Amendment, and whether the New York Lien Law provided sufficient process of law. Rentar argued that these questions were substantial because the filing of a lien "impinged" the economic interests of the property owner, and because the Fourteenth Amendment protects against such minimal deprivations. Appellants' Jurisdictional Statement ("JS") at 14-15, *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, No. 77-1775. Appellants argued that other courts had recognized that the filing of a mechanics' lien did impair constitutionally significant interests, JS at 10, and that the United States Supreme Court's summary affirmance in *Spielman-Ford, Inc.* v. *Hanson's, Inc.*, 417 U.S. 901 (1973), *aff'g without opinion*, 379 F. Supp. 997 (D. Ariz. 1973) (holding Arizona's mechanics' lien law constitutional) did not resolve the issues in the case. JS at 11-12.

On this record, we conclude that the Supreme Court's summary dismissal of *Carl A. Morse, Inc.* requires us to dismiss the third claim of Rouse II for failure to state a claim for which relief can be granted. The appeal of *Carl A. Morse, Inc.*, squarely presented the question of the constitutionality of the New York Lien Law under the Fourteenth Amendment. We find no significant factual distinction between *Carl A. Morse, Inc.*, and the case at hand.[2] Nor do we find any "doctrinal developments" subsequent to *Carl A. Morse, Inc.* that suggest that we are no longer bound by the summary action. *See Hicks* v. *Miranda*, 422 U.S. at 344-345. Plaintiff in this case urges that *Carl A. Morse, Inc.* should not be viewed as legally dispositive because appellees in *Carl A. Morse, Inc.* argued in their motion to dismiss or affirm that factual disputes in the case precluded the conclusion that New York Mechanics' Lien Law was unconstitutional. However, appellees in *Carl A. Morse, Inc.* presented this argument only in connection with their motion to *affirm* the decision below. *See* Appellee's Motion to Dismiss or Affirm at 8, *Carl A. Morse, Inc.* v. *Rentar Industrial Development Corp.*, No. 77-1775. A motion to affirm is entirely distinct from a motion to dismiss for failure to present a substantial federal question. *Compare* Sup. Ct. R. 16.1(b) with Sup. Ct. R. 16.1(c).

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[2] If anything, the facts of the case at hand present less reason to find the New York Lien Law deprives plaintiff of a constitutionally significant property interest. In *Carl A. Morse, Inc.* appellants alleged that the filing of liens "almost destroyed [appellants'] ability to enter into a permanent mortgage on the premises". JS at 5. Appellants further alleged that as a result of the filing of the liens, all individual appellants had been required to enter into a personal guarantee for a letter of credit for a sum in excess of a million dollars, and had sustained out-of-pocket costs in excess of $17,000 per year. *Id.* at 6. We find no comparable allegations of harm in this case.

Appendix B

3. *Diversity Jurisdiction*

Under 28 U.S.C. § 1332(a)(1), federal district courts have original jurisdiction of all civil actions where the matter in controversy exceeds $10,000 and is between "citizens of different states." The citizenship of corporations is determined by 28 U.S.C. § 1332(c): they are deemed citizens "of any State by which it has been incorporated and of the State where it has its principal place of business."

In both Rouse I and II, plaintiff Rouse alleges its own Maryland citizenship by virtue of incorporation in the State of Maryland and a principal place of business in Maryland. Rouse further alleges Delaware (state of incorporation) and Illinois (principal place of business) citizenship on the part of Morse, and New York citizenship for all defendants other than Morse in Rouse II. In its motion to dismiss for lack of diversity jurisdiction, Morse contends that neither Rouse I nor Rouse II is an action between "citizens of different states" as its own principal place of business is New York, not Illinois, and as Rouse's principal place of business is also in New York rather than Maryland.

(footnote continued from preceding page)

> ment. They have much more to lose in the event of default. There must be some procedure for the interim protection of contractors in this situation *** [Considering their vulnerability, a] contractor must have some protection against subsequent bona fide purchasers between the time he completes the work and the time [that] he gets a judgment.

56 A.D.2d at 37, 391 N.Y.S. at 430 (quoting *Cook* v. *Carlson*, 364 F. Supp. 24, 27 (D.S.D. 1973)). This account establishes that the classification is based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy . . .". *Dieffenbach* v. *Attorney Gen. of Vt.*, 604 F.2d at 195 (quoting *Allied Stores* v. *Bowers*, 358 U.S. 522 (1959)).

Appendix B

The recent case of *R.G. Barry Corp.* v. *Mushroom Makers,* 612 F.2d 651 (2d Cir. 1979) outlines the two tests used in this circuit to determine principal place of business for diversity purposes. The first, frequently referred to as the "nerve center" test (after Judge Weinfeld's language in *Scot Typewriter Co.* v. *Underwood Corp.,* 170 F. Supp. 862, 865 (S.D.N.Y. 1959)), applies "where corporate operations are spread across numerous states." This test emphasizes "those factors that identify the place where overall corporate policy originates." *R.G. Barry Corp.* v. *Mushroom Makers,* 612 F.2d at 655. The second test, which may be called the "public contacts test", applies "when . . . corporate operations are centralized." This test focuses "upon the state in which a corporation has its most extensive contacts with, or greatest impact on the general public." *Id.*

In this case, we find the public contacts test the appropriate standard by which to determine Rouse's principal place of business, and under that test, we find that Rouse's principal place of business is New York.

The public contacts test rather than the nerve center test is appropriate in this case because Rouse is not a company "engaged in far-flung and varied activities which are carried on in different states" as was the Underwood Corp. in *Scot Typewriter.* Nor are plaintiff's operations so purely managerial that its nerve center and its locus of corporate operations can be viewed as one and the same. *See Danbury Bowlarama Corp.* v. *RCA Corp.,* 414 F. Supp. 354 (S.D.N.Y. 1976). Rather, Rouse, a Maryland corporation, engages in a single activity located some distance from its corporate headquarters: it manages and maintains a shopping mall in Staten Island, New York. The corporate operations of Rouse are thus most aptly described as "centralized." While plaintiff cites language appearing in *Phillip*

Morris v. *Sun Leasing Co.*, 371 F. Supp. 1233, 1234 (S.D.N.Y. 1979) to the effect that the "nerve center" test is favored in this circuit, this language is contradicted by both previous case law and subsequent decisions. *See, e.g., R.G. Barry Corp.* v. *Mushroom Makers*, 612 F.2d 651, 654-655 (2d Cir. 1979) ("two consistent lines of authority . . . concerning the significance to be accorded different aspects of corporate activity" in determining principal place of business); *Danbury Bowlarama* v. *R.C.A.*, 414 F. Supp. 357, 354 (S.D.N.Y. 1976) (applies nerve center test but questions whether is to be favored in all cases); *Inland Rubber Corp.* v. *Triple A Tire Service, Inc.*, 220 F. Supp. 490, 496 (S.D.N.Y. 1963) (legislative history of section 1332(c) suggests dominant emphasis should be placed on locus of corporate operations).

Applying the public contacts test, we conclude that Rouse's principal place of business is in New York. Rouse owns and operates a shopping mall in Staten Island, New York. All of its full time employees are in New York, and the only significant property it owns is in New York. The bulk of its daily operating decisions are made in New York. While plaintiff is not in the business of selling consumer goods to the general public, it does invite the general public onto its property to patronize the concerns of its lessees. On similar facts, the Southern District of Iowa concluded that the site of a shopping center was its owner's principal place of business. *Bullock* v. *Wiebe Construction Co.*, 241 F. Supp. 961 (S.D. Iowa 1965). We find plaintiff's attempts to distinguish *Bullock* unpersuasive.[4]

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[4] Plaintiff argues that *Bullock* should not be regarded as useful authority because it does not discuss where the defendant's corporate services were furnished or where its corporate tax returns were filed.

(footnote continued on following page)

Plaintiff also argues that "the perception . . . that the Mall is owned by an out-of-state company" is a reason to declare its principal place of business is in Maryland. We reject this argument. The only evidence of "local perceptions" that plaintiff has produced is an article from the *Staten Island Advance* which incorrectly states that the Mall is owned by the Rouse Company, the plaintiff's Maryland-based parent. We doubt that a single appositive in an article from a newspaper of unspecified circulation or reputation is likely to create widespread public opinion on the issue of plaintiff's citizenship. Aside from this misstatement, moreover, the article presents a fairly even-handed account of this lawsuit. Thus, even assuming that the concept of local prejudice is not "a relic of the past" as Judge Kaufman has suggested, *R.G. Barry Corp.* v. *Mushroom Makers*, 612 F.2d at 656, plaintiff has not established its existence in this case.

As plaintiff is a citizen of New York and Maryland, no diversity exists between it and the defendants other than

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(footnote continued from preceding page)

As to the former, the opinion is clear that ". . . essentially all of the management and administration of the corporation's business is performed at its office in Ralston, Nebraska." 241 F. Supp. at 963. As to the latter, the place of filing tax returns may be relevant, but is by no means dispositive, particularly when the public contacts test is being applied. *See Uniroyal, Inc.* v. *Heller*, 65 F.R.D. 83, 87 (S.D.N.Y. 1979) (citing *Kelly* v. *United States Steel Corp.*, 284 F.2d 850 3d Cir. 1960)). Plaintiff also criticizes *Bullock* for failing to discuss "the policies underlying diversity jurisdiction." As we do not find that plantiff has established that it is likely to suffer from local prejudice, *see* p. 8-9, *infra*, we do not find *Bullock's* failure in this regard significant. Finally, while *Bullock* did not rely upon authority specifically from the Southern District of New York or the Second Circuit, it did cite *Textron Electronics, Inc.* v. *Unholtz-Dickie Corp.*, 193 F. Supp. 456, 458 (D. Conn. 1961), a case that quotes from *Scot Typewriter* and cites other cases from this district.

Morse, as those defendants are also New York citizens. Plaintiff maintains, however, that diversity still exists between it and defendant Morse, as it alleges Morse is a citizen of Illinois and Delaware. Morse denies this allegation, contending its citizenship is of New York and Delaware. On the papers submitted thus far, we do not find that plaintiff has sustained its burden of proving diversity exists between it and Morse. However, since Rouse alleges it has not completed discovery on the issue of Morse's principal place of business, we defer decision on this matter until discovery is complete.

4. *Conclusion*

We dismiss the third cause of action of Rouse II for failure to state a claim upon which relief can be granted. We hold that plaintiff is a citizen of New York and Maryland, and therefore, that no diversity exists between plaintiff and the defendants other than Morse. We defer decision on the issue of Morse's principal place of business until Rouse completes its discovery on this issue. We also defer decision on the issue of whether to dismiss Rouse II completely, or whether to retain jurisdiction over the pendent state claims raised in that action, until such time as the matter of Morse's citizenship can be resolved.

SO ORDERED.

/S/ CHARLES E. STEWART JR.
United States District Judge

Dated: New York, New York
October 21, 1982

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1246 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC.,

Defendant.

82 Civ. 1611 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC., *et al.*,

Defendants.

MEMORANDUM DECISION

STEWART, District Judge:

In a Memorandum Decision dated October 21, 1982, we held that the question of the constitutionality of the New York Lien Law was sufficiently substantial to sustain federal question jurisdiction in *Rouse SI Shopping Center Inc.* v. *Morse Diesel, Inc., et al.*, 82 Civ. 1611 (CES) ("Rouse II"), but that, on the merits, plaintiff's challenge to the Lien Law failed. We further held that as the plaintiff Rouse and the defendants other than Morse were all citizens of

New York, no diversity jurisdiction existed in the case. We nonetheless deferred decision on the issue of whether to dismiss Rouse II completely or to retain the pendent state claims pending resolution of the issue of defendant Morse's citizenship. The reason for this deferral was authority suggesting that once federal question jurisdiction has attached, a federal court has the power to hear pendent state claims even though the federal claim may be dismissed before trial. *See* 13 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3567 at 451-452 (1975) and cites therein, including *Ryan* v. *Walter Thompson Co.*, 453 F.2d 444, 446 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972). *See also Jarvis* v. *Elerding*, 504 F. Supp. 606, 609 (C.D. Cal. 1980).[1] It seemed to us that if it turned out that diversity jurisdiction existed in *Rouse SI Shopping Center, Inc.* v. *Morse Diesel, Inc.*, 82 Civ. 1256 (CES) ("Rouse I"), judicial economy might well be served by hearing the pendent claims in Rouse II in the same forum. We had not definitely decided that the state claims would be retained, but assuming that the issue of Morse's citizenship could be resolved quickly, to leave the issue open seemed the most prudent course.

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[1] Dictum in *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966) states that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." This proposition, however was questioned in *Rosado* v. *Wyman*, 397 U.S. 397, 404 (1970), a case which held that the mooting of a federal claim did not divest the federal court of jurisdiction over pendent claims. *Rosado* stressed "the common sense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation. . .". 397 U.S. at 405. Cases following *Rosado* have held that the question of jurisdiction over pendent claims after dismissal of federal claims is "one of discretion, not of power." *State of Arizona* v. *Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

The issue of Morse's citizenship, however, has not been resolved quickly. The parties—although for different reasons—now seek dismissal of the Rouse II action. We grant these requests. The retention of pendent state claims following dismissal of the federal claim that grounded federal question jurisdiction is a matter for the discretion of the district court. *State of Arizona* v. *Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977). Factors relevant to the exercise of a court's discretion include whether the litigants had expended considerable time and effort on the state law issues before the federal issues were dismissed, *id.*, and whether the state law issues implicate federal policy considerations. *See Jervis* v. *Elerding*, 504 F. Supp. 606, 610 (C.D. Ca. 1980). We find neither of these factors present here. Although we had once thought that judicial economy might be served by retaining the pendent claims, it now appears that dismissal of this case will expedite its resolution. Accordingly, finding no diversity between the plaintiff and the defendants other than Morse, and finding the federal question that grounded federal questions jurisdiction non-frivolous but without merit, and finding that no substantial reasons support our retention of jurisdiction over pendent state claims, we dismiss Rouse II as to all defendants.[2]

Our dismissal of Rouse II mandates our remand of *North Eastern Fabricators, Inc.* v. *Rouse SI Shopping Center*, 82 Civ. 3197 (CES), to the state court of Richmond County. This case was removed on diversity grounds by the plaintiff,

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[2] In a letter dated December 16, 1982, plaintiff requests that Rouse II be dismissed only as to defendants other than Morse. Given the requirement of complete diversity for jurisdiction under 28 U.S.C. § 1332, however, *see Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), dismissal as to Morse as well is appropriate.

and prosecution stayed by consent pending the outcome of the motions directed to jurisdiction in Rouse I and II. The jurisdictional issues in Rouse II having now been resolved, remand under 28 U.S.C. § 1447(c) is appropriate.

In sum, therefore, Rouse II is dismissed as to all defendants; *North Eastern Fabricators Inc.* is remanded to the state court.

SO ORDERED.

/s/ CHARLES E. STEWART, JR.
United States District Judge

Dated: New York, New York
December 29, 1982

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civ. 1246 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC.,

Defendant.

82 Civ. 1611 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff,

—against—

MORSE/DIESEL, INC., *et al.*,

Defendants.

82 Civ. 3197 (CES)

NORTH EASTERN FABRICATORS, INC.,

Plaintiff,

—against—

ROUSE SI SHOPPING CENTER, *et al.*,

Defendants.

ORDER

STEWART, District Judge:

Due to a clerical error, our Memorandum Decision of December 29, 1982 omitted *North Eastern Fabricators, Inc.*

v. *Rouse SI Shopping Center, et al.*, 82 Civ. 3197 (CES) from the caption on the first page. We accordingly amend the caption of that decision to include this case, as indicated above.

SO ORDERED.

[Stamp]

[SIGNED BY CHARLES E. STEWART, JR.]
United States District Judge

Dated: New York, New York
January 11, 1983

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

82 Civil 1611 (CES)

ROUSE SI SHOPPING CENTER, INC.

Plaintiff

—against—

MORSE/DIESEL, INC. ET AL

Defendants

82 Civil 3197 (CES)

NORTH EASTERN FABRICATORS, INC.

Plaintiff

—against—

ROUSE SI SHIPPING CENTER, ET AL

Defendants

JUDGMENT

Defendant(s) having moved for an order dismissing the complaint in 82 Civil 1611, and the said motion having come before the Honorable Charles E. Stewart, United States District Judge, and the Court thereafter on December 30, 1982, having handed down its memorandum decision, granting the said motion, and remanding 82 Civil 3197 to the State court, it is,

ORDERED, ADJUDGED AND DECREED: That the complaint be and it is hereby dismissed in 82 Civil 1611, as to all defendants, and it is further,

Appendix E

ORDERED: That 82 Civil 3197, be and it is hereby remanded to the State Court.

/s/ RAYMOND F. BURGHARDT
Clerk

Dated: NEW YORK, N. Y.
January 17, 1983

APPENDIX G

§ 3. Mechanic's lien on real property

A contractor, subcontractor, laborer, materialman, landscape gardener, nurseryman or person or corporation selling fruit or ornamental trees, roses, shrubbery, vines and small fruits, who performs labor or furnishes materials for the improvement of real property with the consent or at the request of the owner thereof, or of his agent, contractor or subcontractor, shall have a lien for the principal and interest, of the value, or the agreed price, of such labor or materials upon the real property improved or to be improved and upon such improvement, from the time of filing a notice of such lien as prescribed in this chapter. Where the contract for an improvement is made with a husband or wife and the property belongs to the other or both, the husband or wife contracting shall also be presumed to be the agent of the other, unless such other having knowledge of the improvement shall, within ten days after learning of the contract give the contractor written notice of his or her refusal to consent to the improvement. Within the meaning of the provisions of this chapter, materials actually manufactured for but not delivered to the real property, shall also be deemed to be materials furnished.

§ 9. Contents of notice of lien

The notice of lien shall state:

1. The name and residence of the lienor; and if the lienor is a partnership or a corporation, the business address of such firm, or corporation, the names of partners and principal place of business, and if a foreign corporation, its principal place of business within the state.

1-a. The name and address of the lienor's attorney, if any.

2. The name of the owner of the real property against whose interest therein a lien is claimed, and the interest of the owner as far as known to the lienor.

3. The name of the person by whom the lienor was employed, or to whom he furnished or is to furnish materials; or, if the lienor is a contractor or subcontractor, the person with whom the contract was made.

4. The labor performed or materials furnished and the agreed price or value thereof, or materials actually manufactured for but not delivered to the real property and the agreed price or value thereof.

5. The amount unpaid to the lienor for such labor or materials.

6. The time when the first and last items of work were performed and materials were furnished.

7. The property subject to the lien, with a description thereof sufficient for identification; and if in a city or village, its location by street and number, if known. A failure to state the name of the true owner or contractor, or a misdescription of the true owner, shall not affect the validity of the lien. The notice must be verified by the lienor or his agent, to the effect that the statements therein contained are true to his knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

§ 11. Service of copy of notice of lien

At any time after filing the notice of lien, the lienor may serve a copy of such notice upon the owner, if a natural person, by delivering the same to him personally, or if the owner cannot be found, to his agent or attorney, or by

leaving it at his last known place of residence in the city or town in which the real property or some part thereof is situated, with a person of suitable age and discretion, or by registered or certified mail addressed to his last known place of residence, or, if such owner has no such residence in such city or town, or cannot be found, and he has no agent or attorney, by affixing a copy thereof conspicuously on such property, between the hours of nine o'clock in the forenoon and four o'clock in the afternoon; if the owner be a corporation, said service shall be made by delivering such copy to and leaving the same with the president, vice-president, secretary or clerk to the corporation, the cashier, treasurer or a director or managing agent thereof, personally, within the state, or if such officer cannot be found within the state by affixing a copy thereof conspicuously on such property between the hours of nine o'clock in the forenoon and four o'clock in the afternoon, or by registered or certified mail addressed to its last known place of business. Until service of the notice has been made, as above provided, an owner, without knowledge of the lien, shall be protected in any payment made in good faith to any contractor or other person claiming a lien. A failure to serve the notice does not otherwise affect the validity of such lien.

§ 12-a. Amendment

1. Within sixty days after the original filing, a lienor may amend his lien upon twenty days' notice to existing lienors, mortgagees and the owner, provided that no action or proceeding to enforce or cancel the mechanics' lien has been brought in the interim, where the purpose of the amendment is to reduce the amount of the lien, except the question of wilful exaggeration shall survive such amendment.

2. In a proper case, the court may, upon five days' notice to existing lienors, mortgagees and owner, make an order amending a notice of lien upon a public or private improvement, *nunc pro tunc*. However, no amendment shall be granted to the prejudice of an existing lienor, mortgagee or purchaser in good faith, as the case may be.

§ 13. Priority of liens

(1) A lien for materials furnished or labor performed in the improvement of real property shall have priority over a conveyance, mortgage, judgment or other claim against such property not recorded, docketed or filed at the time of the filing of the notice of such lien, except as hereinafter in this chapter provided; over advances made upon any mortgage or other encumbrance thereon after such filing, except as hereinafter in this article provided; and over the claim of a creditor who has not furnished materials or performed labor upon such property, if such property has been assigned by the owner by a general assignment for the benefit of creditors, within thirty days before the filing of either of such notices; and also over an attachment hereafter issued or a money judgment hereafter recovered upon a claim, which, in whole or in part, was not for materials furnished, labor performed or moneys advanced for the improvement of such real property; and over any claim or lien acquired in any proceedings upon such judgment. Such liens shall also have priority over advances made upon a contract by an owner for an improvement of real property which contains an option to the contractor, his successor or assigns to purchase the property, if such advances were made after the time when the labor began or the first item of material was furnished, as stated in the notice of lien. If several buildings are

demolished, erected, altered or repaired, or several pieces or parcels of real property are improved, under one contract, and there are conflicting liens thereon, each lienor shall have priority upon the particular part of the real property or upon the particular building or premises where his labor is performed or his materials are used. Persons shall have priority on account of the time of filing their respective notices of liens, but all liens shall be on a parity except as hereinafter in section fifty-six of this chapter provided; and except that in all cases laborers for daily or weekly wages shall have preference over all other claimants under this article.

(1-a) Parties having assignments of moneys due or to become due under a contract for the improvement of real property, unless such assignments be set aside as diversions of trust assets as provided in article three-a of this chapter, shall have priority as follows:

An assignee of moneys or any part thereof, due or to become due under a contract for the improvement of real property, whose assignment is duly filed prior to the filing of a notice of lien or assignment of every other party to the action, shall have priority over those parties to the extent of moneys advanced upon such assignment before the filing of the notice of lien or assignment next subsequent to his assignment, but as to moneys advanced subsequent to a notice of lien or assignment filed and unsatisfied or not discharged such assignee for the purpose of determining his proportionate share of moneys available for distribution as provided in subdivision one of this section shall be treated as a lienor having a lien to the extent of moneys so advanced.

Appendix G

An assignee of moneys or any part thereof, due or to became due under a contract for an improvement of real property whose assignment is duly filed subsequent to the filing of the notice of lien or assignment of any other party shall for the purpose of determining his proportionate share of moneys available for distribution, as provided in subdivision one of this section be treated as a lienor having a lien to the extent of moneys actually advanced upon such assignment prior to the filing thereof.

(2) When a building loan mortgage is delivered and recorded a lien shall have priority over advances made on the building loan mortgage after the filing of the notice of lien; but such building loan mortgage, whenever recorded, to the extent of advances made before the filing of such notice of lien, shall have priority over the lien, provided it or the building loan contract contains the covenant required by subdivision three hereof, and provided the building loan contract is filed as required by section twenty-one of this chapter. Every mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion thereof shall, to the extent of advances made before the filing of a notice of lien, have priority over liens thereafter filed if it contains the covenant required by subdivision three hereof. The lien of a vendee under an executory contract for the sale of land and the improvement thereof by the construction of a building thereon shall, to the extent of amounts paid thereunder to the vendor before the filing of a notice of lien, have priority over liens filed after the contract or memorandum thereof is recorded as provided in section two hundred ninety-four of the real property law if the recorded contract or memorandum specifies the total amount of payments made by the vendee

or required by the contract to be made by the vendee before conveyance of title.

(3) Every such building loan mortgage and every mortgage recorded subsequent to the commencement of the improvement and before the expiration of four months after the completion of the improvement shall contain a covenant by the mortgagor that he will receive the advances secured thereby and will hold the right to receive such advances as a trust fund to be applied first for the purpose of paying the cost of improvement, and that he will apply the same first to the payment of the cost of improvement before using any part of the total of the same for any other purpose, provided, however, that if the party executing the building loan contract is not the owner of the fee but is the party to whom such advances are to be made, a building loan contract executed and filed pursuant to section twenty-two of this chapter shall contain the said covenant by such party executing such building loan contract, in place of the covenant by the mortgagor in the building loan mortgage as hereinbefore provided. Nothing in this subdivision shall be considered as imposing upon the lender any obligation to see to the proper application of such advances by the owner; and nothing in this section, nor in that portion of section two of this chapter, defining "cost of improvement" shall be deemed to impair or subordinate the lien of any mortgage containing the covenant required by this subdivision. To the extent that the trust res consists of the right to receive advances as distinct from advances actually received, breach of the trust shall give rise to a civil action only. The covenant provided for herein shall be deemed to have been made and to be in full force and effect if, in lien of the foregoing provisions, a statement

in substantially the following form is contained in the mortgage or contract, "subject to the trust fund provisions of section thirteen of the lien law."

(4) Nothing in subdivision two or three of this section shall apply to any mortgage given by a purchaser for value from an owner making the improvement and recorded prior to the filing of a lien pursuant to this chapter, provided the instrument of conveyance contains the provisions mentioned in subdivision five herein.

(5) No instrument of conveyance recorded subsequent to the commencement of the improvement, and before the expiration of four months after the completion thereof, shall be valid as against liens filed within four months from the recording of such conveyance, unless the instrument contains a covenant by the grantor that he will receive the consideration for such conveyance and will hold the right to receive such consideration as a trust fund to be applied first for the purpose of paying the cost of the improvement and that he will apply the same first to the payment of the cost of the improvement before using any part of the total of the same for any other purpose. Nothing in this subdivision shall be construed as imposing upon the grantee any obligation to see to the proper application of such consideration by the grantor. Nothing in this subdivision shall apply to a deed given by a referee or other person appointed by the court for the sole purpose of selling real property. Nothing in this subdivision shall apply to the consideration received by a grantor who, pursuant to a written agreement entered into and duly recorded prior to the commencement of the improvement, conveys to the person making such improvement, the land upon which such improvement is made. However, such a conveyance shall be subject to liens filed prior thereto, as provided by

this chapter. To the extent that the trust res consists of the right to receive the consideration for such conveyance as distinct from the consideration actually received, breach of the trust shall give rise to a civil action only. The covenant provided for herein shall be deemed to have been made and to be in full force and effect if, in lieu of the foregoing provisions, a statement in substantially the following form is contained in the instrument of conveyance, "subject to the trust fund provisions of section thirteen of the lien law."

Except that this section shall not apply to any mortgage taken by the home owners' loan corporation, a corporation created under an act of congress, known as the "home owners' loan act of nineteen hundred thirty-three," and the "home owners' loan act of nineteen hundred thirty-three as amended," and said mortgage shall have priority over any and all liens filed subsequent to the date of the recording of said mortgage whether or not the cash and/or bonds for which said mortgage has been taken as security, shall have been advanced at the time of the execution of such mortgage or subsequent thereto, and it shall not be necessary to execute and file any building loan contract or any other contract, in compliance with this section or any part thereof.

(6) Every assignment of moneys, or any part thereof, due or to become due under a contract for the improvement of real property shall contain a covenant by the assignor that he will receive any moneys advanced thereunder by the assignee and will hold the right to receive such moneys as trust funds to be first applied to the payment of trust claims as defined in section seventy-one of the lien law, and that he will apply the same to such payments only, before using any part of the moneys for any other purpose.

§17. Duration of lien

No lien specified in this article shall be a lien for a longer period than one year after the notice of lien has been filed, unless within that time an action is commenced to foreclose the lien, and a notice of the pendency of such action, whether in a court of record or in a court note of record, is filed with the county clerk of the county in which the notice of lien is filed, containing the names of the parties to the action, the object of the action, a brief description of the real property affected thereby, and the time of filing the notice of lien; or unless an order be granted within one year from the filing of such notice by a court of record or a judge or justice thereof, continuing such lien, and such lien shall be redocketed as of the date of granting such order and a statement made that such lien is continued by virtue of such order. No lien shall be continued by such order for more than one year from the granting thereof, but a new order and entry may be made in each successive year. If the lienor is made a party defendant in an action to enforce another lien, and the plaintiff or such defendant has filed a notice of the pendency of the action within the time prescribed in this section, the lien of such defendant is thereby continued. Such action shall be deemed an action to enforce the lien of such defendant lienor. The failure to file a notice of pendency of action shall not abate the action as to any person liable for the payment of the debt specified in the notice of lien, and the action may be prosecuted to judgment against such person. The provisions of this section in regard to continuing liens shall apply to liens discharged by deposit or by order on the filing of an undertaking. Where a lien is discharged by deposit or by order, a notice of pendency of action shall not be filed.

A lien, the duration of which has been extended by the filing of a notice of the pendency of an action as above provided, shall nevertheless terminate as a lien after such notice has been canceled as provided in section sixty-five hundred fourteen of the civil practice law and rules or has ceased to be effective as constructive notice as provided in section sixty-five hundred thirteen of the civil practice law and rules.

§ 19. Discharge of lien for private improvement

A lien other than a lien for labor performed or materials furnished for a public improvement specified in this article, may be discharged as follows:

(1) By the certificate of the lienor, duly acknowledged or proved and filed in the office where the notice of lien is filed, stating that the lien is satisfied or released as to the whole or a portion of the real property affected thereby and may be discharged in whole or in part, specifying the part. Upon filing such certificate, the county clerk in the office where the same is filed, shall note the fact of such filing in the "lien docket" in the column headed "Proceedings had" opposite the docket of such lien.

(2) By failure to begin an action to foreclose such lien or to secure an order continuing it, within one year from the time of filing the notice of lien, unless an action be begun within the same period to foreclose a mortgage or another mechanic's lien upon the same property or any part thereof and a notice of pendency of such action is filed according to law, but a lien, the duration of which has been extended by the filing of a notice of the pendency of an action as herein provided, shall nevertheless terminate as a lien after such notice has been canceled or has ceased to be effective as constructive notice.

(3) By order of the court vacating or cancelling such lien of record, for neglect of the lienor to prosecute the same, granted pursuant to section fifty-nine of this chapter.

(4) Either before or after the beginning of an action by the owner or contractor executing an undertaking with two or more sufficient sureties, who shall be free-holders, to the clerk of the county where the premises are situated, in such sums as the court or a judge or justice thereof may direct, not less than the amount claimed in the notice of lien conditioned for the payment of any judgment which may be rendered against the property for the enforcement of the lien. The sureties must together justify in at least double the sum named in the undertaking. A copy of the undertaking, with notice that the sureties will justify before the court, or a judge or justice thereof, at the time and place therein mentioned, must be served upon the lienor or his attorney, not less than five days before such time. Upon the approval of the undertaking by the court, judge or justice an order shall be made by such court, judge or justice discharging such lien. The execution of any such bond or undertaking by any fidelity or surety company authorized by the laws of this state to transact business, shall be equivalent to the execution of said bond or undertaking by two sureties; and where a certificate of qualification has been issued by the superintendent of insurance under the provisions of section three hundred and twenty-seven of the insurance law, and has not been revoked, no justification or notice thereof shall be necessary, and in such case a copy of the undertaking and notice of the application for an order to discharge the lien must be served upon the lienor or his attorney not less than two days before such application for such order is made. Any such company may execute any such bond or undertaking

as surety by the hand of its officers, or attorneys, duly authorized thereto by resolution of its board of directors, a certified copy of which resolution, under the seal of said company, shall be filed with each bond or undertaking. If the lienor cannot be found, or does not appear by attorney, such service may be made by leaving a copy of said undertaking and notice at the lienor's place of residence, or if a corporation at its principal place of business within the state as stated in the notice of lien, with a person of suitable age and discretion therein, or if the house of his abode or its place of business is not stated in said notice of lien and is not known, then in such manner as the court may direct. The premises, if any, described in the notice of lien as the lienor's residence or place of business shall be deemed to be his said residence or its place of business for the purposes of said service at the time thereof, unless it is shown affirmatively that the person serving the papers or directing the service had knowledge to the contrary. Notwithstanding the other provisions of this subdivision relating to service of notice, in any case where the mailing address of the lienor is outside the state such service may be made by registered or certified mail, return receipt requested, to such lienor at the mailing address contained in the notice of lien.

(5) Upon the filing in the office of the clerk of the county where the property is situated, a transcript of a judgment of a court of competent jurisdiction, together with due proof of service of due notice of entry thereof, showing a final determination of the action in favor of the owner of the property against which the lien was claimed.

(6) Where it appears from the face of the notice of lien that the claimant has no valid lien by reason of the

the lienor. Such notice shall require the lienor to commence an action to enforce the lien, within a time specified in the notice, not less than thirty days from the time of service, or show cause at a special term of a court of record, or at a county court, in a county in which the property is situated, at a time and place specified therein, why the notice of lien filed or the bond given should not be vacated and cancelled, or the deposit returned, as the case may be. Proof of such service and that the lienor has not commenced the action to foreclose such lien, as directed in the notice, shall be made by affidavit, at the time of applying for such order.